

# Fordham Law Review

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Volume 85 | Issue 5

Article 16

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2017

## The Bellwether Settlement

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### Recommended Citation

Adam S. Zimmerman, *The Bellwether Settlement*, 85 Fordham L. Rev. 2275 (2017).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol85/iss5/16>

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## THE BELLWETHER SETTLEMENT

Adam S. Zimmerman\*

*This Article examines the use of bellwether mediation in mass litigation. Bellwether mediations are different from “bellwether trials,” a practice where parties choose a representative sample of cases for trial to determine how to resolve a much larger number of similar cases. In bellwether mediations, the parties instead rely on a representative sample of settlement outcomes overseen by judges and court-appointed mediators.*

*The hope behind bellwether mediation is that different settlement outcomes, not trials, will offer the parties crucial building blocks to forge a comprehensive global resolution. In so doing, the process attempts to (1) yield important information about claims, remedies, and strategies that parties often would not share in preparation for a high-stakes trial; (2) avoid outlier or clustering verdicts that threaten a global resolution for all the claims; and (3) build trust among counsel in ways that do not usually occur until much later in the litigation process.*

*The embrace of such “bellwether settlements” raises new questions about the roles of the judge and jury in mass litigation. What function do courts serve when large cases push judges outside their traditional roles as adjudicators of adverse claims, supervisors of controlled fact-finding, and interpreters of law? This Article argues that, as in other areas of aggregate litigation, courts can play a vital “information-forcing” role in bellwether settlement practice. Even in a system dominated by settlement, judges can help parties set ground rules, open lines of communication, and, in the process, make more reasoned trade-offs. In so doing, courts protect the procedural, substantive, and rule-of-law values that aggregate settlements may threaten.*

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\* Professor of Law, Loyola Law School. From 2001 to 2003, I was Deputy Special Master to the U.S. September 11 Victim Compensation Fund. I owe deep thanks to the insightful comments of Lynn Baker, Bob Bone, Beth Burch, Howard Erichson, Alexi Lahav, Judge Brian Martinotti, Ellen Relkin, Jay Tidmarsh, Judge Jack B. Weinstein, Judge Diane Welsh, and all the participants of the colloquium entitled *Civil Litigation Ethics at a Time of Vanishing Trials* held at Fordham University School of Law. For an overview of the colloquium, see Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017). I also owe a special debt to my wife for her insightful edits and endless patience with this project.

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## INTRODUCTION

A curious thing happened in a Bergen County court in New Jersey.<sup>1</sup> In a case involving thousands of people with defective hip implants, the parties reached a \$1 billion global settlement in record time through an unprecedented series of “bellwether settlements.”<sup>2</sup>

For years, courts have relied on “bellwether trials” to resolve large numbers of similar lawsuits.<sup>3</sup> In a bellwether trial, the parties select a small group of cases for jury trial out of a larger pool of similar claims.<sup>4</sup> Steering committees of plaintiff and defense lawyers then use information gleaned from those trials to resolve the remaining cases.<sup>5</sup> Bellwether trials have been used in many high-profile cases—most famously in the Vioxx litigation—and, most recently, in General Motors’s litigation over its defective ignition

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1. Cf. Stephen C. Yeazell, *Intervention and the Idea of Litigation: A Commentary on the Los Angeles School Case*, 25 UCLA L. REV. 244, 244 (1977) (documenting novel “town hall” court hearing techniques to resolve multiparty disputes and observing that a “curious thing is happening in a courtroom in downtown Los Angeles”).

2. See Transcript of Global Settlement Program Hearing at 39, *In re Stryker Rejuvenate & ABG II Modular Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Nov. 3, 2014) (“This really is unprecedented in the area of multi-county aggregate mass litigation. It’s the first time I know of that anyone entered into the world of bellwether mediations and bellwether settlements.”); Sindhu Sundar, *\$1B Stryker Deal Shows Path to Trial-Free MDL Settlements*, LAW360 (Nov. 6, 2014), <http://www.law360.com/articles/593672/1b-stryker-deal-shows-path-to-trial-free-mdl-settlements> [https://perma.cc/8SK7-QVXL].

3. See, e.g., *In re Methyl Tertiary Butyl Ether (“MTBE”) Prods. Liab. Litig.*, No. 1:00-1898, MDL 1358(SAS), M21-88, 2007 WL 1791258, at \*2 (S.D.N.Y. June 15, 2007) (“[R]esolution of these issues often facilitates settlement of the remaining claims.”); Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

4. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.756 (FED. JUDICIAL CTR. 2004).

5. See *infra* Part I.

switches.<sup>6</sup> As multidistrict proceedings begin to take up a larger portion of the federal docket,<sup>7</sup> the use of bellwether trials will only grow.

But instead of bellwether trials, the Bergen County court organized a system of bellwether mediations.<sup>8</sup> In a bellwether mediations, no jury decides the merits or value of the case. Rather, the parties—supervised by the court—rely on a structured sample of mediated settlements involving representative plaintiffs. The different settlement outcomes, much like a series of bellwether trials, are intended to offer the parties crucial “building blocks” of information to globally resolve the remaining cases.<sup>9</sup>

Judge Brian R. Martinotti, the New Jersey state court judge designated to handle the selected cases, was incredibly successful.<sup>10</sup> Following forty representative mediations, the parties resolved more than 2,000 lawsuits in New Jersey state court and a similar number of pending lawsuits in a parallel federal multidistrict litigation in Minnesota—all in one fell swoop.<sup>11</sup> In the end, over 95 percent of the potential plaintiffs accepted settlement offers based on the global agreement.<sup>12</sup>

The court’s complete embrace of a bellwether settlement scheme raises new questions for juries and judges. What do bellwether settlements mean when the procedures and outcomes lack any connection with a jury trial? By dispensing with the jury entirely, the parties arguably give up procedures that are thought to (1) encourage vigorous advocacy before neutral fact-finders,<sup>13</sup> (2) promote fidelity to law by ensuring that settlements correspond to the

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6. See *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006); Bill Vlasic, *G.M. Settles Ignition-Switch Case Planned as Bellwether Trial*, N.Y. TIMES, Apr. 8, 2016, at B4.

7. See Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that “from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts’ entire civil caseload”).

8. See *infra* Part I.

9. See Transcript of Global Settlement Program Hearing, *supra* note 2, at 17 (stating “from those individual pieces of mediation where we would agree on certain evaluations, that helped form building blocks” to global settlement).

10. Judge Martinotti was appointed to serve as a federal district court judge in the U.S. District Court for the District of New Jersey on July 11, 2016. See *Biographical Directory of Federal Judges: Martinotti, Brian R.*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=3608&cid=999&ctype=na&instat=na> (last visited Mar. 25, 2017) [<https://perma.cc/V857-NVCH>].

11. See *infra* Part I.

12. See Jeannie O’Sullivan, *Stryker Adds Patients to \$1B Hip Implant Settlement*, LAW360 (Dec. 19, 2016), <https://www.law360.com/articles/874540/stryker-adds-patients-to-1b-hip-implant-settlement> [[perma.cc/YMG9-AYHC](https://perma.cc/YMG9-AYHC)]. On December 19, 2016, Stryker announced an agreement to compensate more plaintiffs who had undergone hip replacement surgery under similar settlement terms. See Gordon Gibb, *A Tale of Two Billion-Dollar Settlements*, LAWYERSANDSETTLEMENTS.COM (Jan. 25, 2017), <https://www.lawyersandsettlements.com/articles/defective-hip-implants/hip-replacement-implant-failure-defective-5-22019.html> [[perma.cc/RNN7-U3EC](https://perma.cc/RNN7-U3EC)].

13. Cf. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (“Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer and the court would face a bargain proffered for its approval without benefit of adversarial investigation.” (citations omitted)).

merits of the dispute,<sup>14</sup> and (3) provide a democratic bulwark against unelected judges who may harbor biases about what makes for a fair outcome.<sup>15</sup> Nevertheless, the process can benefit parties in other ways. Among other things, they help counsel understand how beneficiaries of a global settlement value different outcomes, while building trust among diverse law firms in high-stakes litigation. Moreover, they help avoid lottery-like verdicts, which bear little relationship to case values and do not shed light about how to fairly resolve thousands of other similar cases.<sup>16</sup>

But bellwether settlements raise bigger questions about the role public courts should play in the overwhelming number of cases resolved through private settlement practice. Judges are traditionally thought to perform three important functions in the civil justice system: (1) hear adverse claims, (2) supervise controlled fact-finding, and (3) interpret law.<sup>17</sup> But what is left for judges to do when big cases push them outside their traditional role as adjudicators?

Bellwether settlements represent one way that some judges have taken on an important “information-forcing” role in aggregate litigation.<sup>18</sup> That is, in mass settlements, judges can influence the quality of settlement negotiations by regulating the ways that parties create, record, and share information.<sup>19</sup> In much the same way that Stephen Yeazell once called for a “NASDAQ for lawsuits,”<sup>20</sup> Judge Martinotti’s bellwether mediations in the end produced a judicially supervised settlement exchange—one designed to help the parties set ground rules, open the lines of communication between far-flung law

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14. See, e.g., Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 697 (2006) (stating bellwether trials “offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated”).

15. Cf. Lahav, *supra* note 3, at 578 (bellwether trials permit juries to have a voice in mass litigation by promoting “a type of ‘group typical’ justice that is at once participatory and collective”).

16. See Alvin K. Hellerstein, *Managerial Judging: The 9/11 Responders’ Tort Litigation*, 98 CORNELL L. REV. 127, 161–63 (2012) (stating bellwether trials do not provide “sufficient information to effect a wholesale global settlement”); Brian R. Martinotti, *Complex Litigation in New Jersey and Federal Courts: An Overview of the Current State of Affairs and a Glimpse of What Lies Ahead*, 44 LOY. U. CHI. L.J. 561, 575 (2012) (“[I]f the parties and counsel are in the midst of successful settlement discussions, a bellwether trial that results in a verdict outside the range of settlement—i.e., an outlier—may empower a party to go forth with the litigation and cause negotiations to break down.”).

17. See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 72–76 (6th ed. 2009) (discussing “dispute resolution” and “law declaration” models of the federal courts); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–71 (1973).

18. See Andrew Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2828461](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828461) [<https://perma.cc/BQW4-7B7V>]; David M. Jaros & Adam S. Zimmerman, *Judging Aggregate Settlement*, 94 WASH. U. L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2897217](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2897217) [<https://perma.cc/3FBL-ZFVC>].

19. See *infra* Part I.

20. Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 143 (Joseph W. Doherty et al. eds., 2012); see also *infra* Part II.C.

firms, and in the process, make more reasoned trade-offs in pursuit of a global settlement.

This Article proceeds in two parts. Part I provides a case study of a bellwether settlement approach to resolving mass disputes, relying on transcripts and interviews with lawyers and mediators involved in *In re Stryker Rejuvenate & ABG II Modular Hip Implant Litigation*.<sup>21</sup> As discussed below, the bellwether mediation process in those cases took place in two stages.<sup>22</sup> First, the parties and court selected a representative sample of cases based on the parties' age, injury, surgeries, and postoperative recovery. A wide variety of plaintiffs and their lawyers participated directly in over forty separate, individual, and confidential mediations. Second, based on the success of those mediated outcomes, the court then appointed a mediator to commence a new phase of global settlement talks. Anonymous data from the individual mediations were shared with a negotiating committee, which in turn relied on each individual settlement to establish benchmarks and variables for determining payouts to the broader group.

Part I also considers the kinds of cases most likely to benefit from a bellwether settlement process. After reaching the global settlement, participating lawyers took care to emphasize that bellwether mediations are not for everyone.<sup>23</sup> But bellwether settlements may provide an effective option in future cases where (1) parties are open to settlement, (2) judges and parties can coordinate and transparently share settlement information in state and federal court, and (3) diverse groups of law firms and plaintiffs actively participate in the mediation process.

Part II explores the broader theoretical questions raised by bellwether settlements. First, the turn to bellwether mediation in *Stryker* reflects a general unease with bellwether trials.<sup>24</sup> Because of the substantial risk and expense associated with "bet-the-company litigation," parties rarely conduct more than a handful of bellwether trials and get very mixed results when they do. Second, the success of a bellwether mediation process illustrates how court-supervised "repeat play" may help resolve large numbers of common cases.<sup>25</sup> Third, even as bellwether mediations challenge the traditional judicial role, courts can remain critical players in policing the integrity of judicial proceedings increasingly dominated by settlement.<sup>26</sup>

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21. No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Nov. 3, 2014). I note that I did not obtain interviews with the defense attorneys involved in the *Stryker* litigation.

22. See *infra* Part I.

23. See Sundar, *supra* note 2.

24. See *infra* Part II.

25. Frank E.A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 28 (2006) (stating negotiators can improve outcomes and build trust through "partial reciprocal disclosures over time" and the involvement of "a third party neutral to facilitate the exchange of information").

26. See *Ex parte Burr*, 22 U.S. 529, 530 (1824) ("[I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court."); see also D. Brock Hornby, *The Business of the U.S. District Courts*, 10 GREEN BAG

## I. CASE STUDY OF A BELLWETHER SETTLEMENT

This part describes the bellwether mediation process used in the *Stryker* litigation, as well as the kinds of cases that may benefit from it in the future.

A. *The Stryker Litigation*

In June 2012, one of the largest medical device companies in the world, Stryker Orthopedics, voluntarily recalled two of its artificial hip implants.<sup>27</sup> When Stryker first unveiled the devices in 2009, it had high hopes. Hip implants have a “neck” that connects to the hip or femur; however, Stryker’s “modular” hip had an extra joint so doctors could easily adjust it to each patient.<sup>28</sup> The device, coated with strong metal alloys, promised to be durable and flexible—critical features of a device designed to serve an aging population seeking greater mobility.<sup>29</sup>

Within a few years, however, Stryker discovered that the titanium and cobalt alloys in the implant could corrode, damaging surrounding tissue, muscle, and bone.<sup>30</sup> Regulators in the United States and Great Britain began to warn consumers about the growing health problem associated with metal hip implants.<sup>31</sup> In the summer of 2012, Stryker recalled the devices and offered blood testing, MRIs, medical examinations, and, if necessary, payment for “revision” surgery to replace the device for uninsured patients.<sup>32</sup> Thousands of its customers sued.<sup>33</sup>

The kinds of people who need hip implants vary, but they often include very elderly patients, as well as young working patients suffering from obesity, sports ailments, or other traumatic injuries. Some suffered allergic reactions, inflammation, or damage to the tissue and muscle groups around the hips and thighs; others required multiple surgeries to replace the implants, sometimes on both hips. And surgery itself carried different risks for different patients. Some operations went smoothly, while others required

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2D 453, 463 (2007) (describing the critical role judges play in protecting “the integrity of the process”).

27. See Greg Ryan, *Stryker Recall Undercuts Key Defense for Implant Makers*, LAW360 (July 10, 2012), <http://www.law360.com/articles/358385> [<https://perma.cc/NY6N-PZMV>]; Press Release, FDA, Stryker Initiates Voluntary Product Recall of Modular-Neck Stems: Action Specific to Rejuvenate and ABG II Modular-Neck Stems (July 6, 2012), <http://www.fda.gov/Safety/Recalls/ucm311043.htm> [<https://perma.cc/N3CS-DATB>].

28. See *id.*

29. See Barnaby J. Feder, *A Parts Supplier to an Aging Population*, N.Y. TIMES (Mar. 26, 2005), <http://www.nytimes.com/2005/03/26/business/a-parts-supplier-to-an-aging-population.html> (“[A]utomakers can only dream of the kind of growth prospects that Stryker has. Ever-increasing numbers of aging baby boomers will be driving demand for Stryker’s hips, knees and spinal implants—and the tools to install them—for years to come.”) [<https://perma.cc/K8W7-LPBU>].

30. See Barry Meier, *Stryker Settles Suits by Hip Implant Patients for \$1 Billion*, N.Y. TIMES, Nov. 4, 2014, at B9.

31. See Barry Meier, *Remedy Is Elusive as Metallic Hips Fail at a Fast Rate*, N.Y. TIMES, Oct. 1, 2011, at A1; Natasha Singer, *Hip Implants Are Recalled by J.&J. Unit*, N.Y. TIMES, Aug. 27, 2010, at B1.

32. See Meier, *supra* note 30.

33. See *id.*

patients to suffer through long, painful recoveries and rehabilitation, with complications including infection, dislocation, pulmonary embolism, stroke, and the need for other additional surgeries.<sup>34</sup>

The litigation that followed presented all the difficulties of a large mass tort case: a large group of varied, severe personal injury claims involving the same product that, if individually tried, could produce endless litigation.<sup>35</sup> Accordingly, the parties moved to consolidate cases in state and federal court. More than 2,000 state cases were consolidated before Judge Brian Martinotti in multicounty litigation (MCL) in Bergen County, New Jersey, where Stryker operates.<sup>36</sup> A similar number of cases were eventually consolidated in federal district court in a multidistrict litigation (MDL) before Judge Donovan Frank in Minnesota.<sup>37</sup>

### B. The Bellwether Settlement Process

The parties' successful bellwether settlement negotiations, as set forth below, took place in two discrete phases. In the first phase, the parties confidentially mediated over forty settlements in federal and state court. In the second phase, negotiating committees relied on anonymous information from those mediations as important "building blocks" to forge a global settlement.

#### 1. Phase I: Individual Mediations

After consolidating the cases, the courts issued case management orders to help organize them, much like many other mass torts. Judge Martinotti, in the New Jersey MCL, appointed lawyers to lead a steering committee charged with coordinating discovery, motion practice, and, if needed, trials.<sup>38</sup> Judge Frank of the Minnesota MDL similarly met with the parties to lay out a schedule for the federal litigation.

Early in the discovery process, however, Judge Martinotti proposed something different. He recommended that the parties consider two bellwether procedures.<sup>39</sup> The first, like most others, anticipated that a series of bellwether trials would commence in three years, beginning in June 2015.

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34. Telephone Interview with Ellen Relkin, Plaintiffs' Lead Counsel, Weitz & Luxenberg (Sept. 9, 2016).

35. See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT*, at vii–xii (2008) (defining mass torts); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 4–10 (1995).

36. Civil Action Case Management Order #1, *In re Stryker Rejuvenate & ABG II Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Feb. 20, 2013).

37. See Greg Ryan, *Suits over 2 Stryker Hip Implants Combined into Minn. MDL*, LAW360 (June 13, 2013), <http://www.law360.com/articles/449919> [<https://perma.cc/SN6P-V6R4>]. Initially, the federal multidistrict litigation included approximately 1,000 cases. See Telephone Interview with Ellen Relkin, *supra* note 34. The parties and the federal mediators, however, reported that by the time the case settled in November 2014, the federal multidistrict litigation had approximately the same number of cases as those proceeding in the New Jersey MCL. See *id.*

38. See Civil Action Case Management Order #1, *supra* note 36.

39. See Initial Mediation Consent Order, *In re Stryker Rejuvenate & ABG II Modular Hip Stem Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Apr. 2, 2013).



In the second procedure, however, the parties would instead prepare for a set of representative mediations, with the hope that the outcomes would help the parties enter global settlement talks with more information and trust. The attorneys were skeptical but ultimately agreed to both procedures.<sup>40</sup>

The lead-up to mediation still required that the parties conduct some limited discovery, which the court organized into two phases. First, plaintiffs had to produce information about the kind of hip replacements they received and the year they were implanted.<sup>41</sup> Because each hip replacement came with a bar code, it was relatively straightforward to determine whether plaintiffs were pursuing the same claims against the correct defendant and to screen out those who alleged a different defect. Second, lawyers had to disclose basic information about each plaintiff, including (1) their ages, (2) the model number of each hip, (3) the nature of the surgery required to replace the hip (or both hips), (4) whether the patient required a second surgery or “re-revision,” as well as (5) any complications arising from the surgery, including fractures, dislocations, or infections.<sup>42</sup> Each disclosure was also shared with the leaders of each steering committee, coded, and tracked in an electronic database.

Judge Martinotti appointed Judge Diane Welsh (a former magistrate judge) and retired Judge C. Judson Hamlin (a former mass tort judge from Middlesex County, New Jersey) to conduct individual mediations.<sup>43</sup> In coordination with Judge Martinotti, Judge Frank appointed Judge Art Boyland (a former chief magistrate judge) to mediate cases in the federal multidistrict litigation in Minnesota.<sup>44</sup> In the first early sessions, the plaintiffs appointed a negotiating team member to present their views about common features of the litigation—like the legal basis for liability and general scientific evidence about how defective hip implants may impact the body.<sup>45</sup>

Originally, the negotiating subcommittee from each side chose two representative cases and Judge Martinotti chose six, for a total of ten mediations.<sup>46</sup> Representative mediations attempted to cover the range of (1) injuries (including inflammation, bilateral hip replacements, and fractured bones); (2) ages (from thirty to eighty years of age); and (3) experiences with medical procedures (multiple surgeries, complications, and infections).<sup>47</sup>

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40. See Transcript of Global Settlement Program Hearing, *supra* note 2.

41. See Civil Action Case Management Order #3, *In re Stryker Rejuvenate & ABG II Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Mar. 19, 2013).

42. See *id.*

43. See Initial Mediation Consent Order, *supra* note 39. The court also appointed Judge James D. Clyne and the Pilgrim Mediation Group. See *id.*

44. Telephone Interview with Diane M. Welsh, Mediator, JAMS (Sept. 9, 2016).

45. See Transcript of Global Settlement Program Hearing, *supra* note 2; Telephone Interview with Ellen Relkin, *supra* note 34.

46. See Transcript of Global Settlement Program Hearing, *supra* note 2.

47. See Civil Action Case Management Order #6, *In re Stryker Rejuvenate & ABG II Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. June 26, 2013); *Experimental Bellwether Mediation Program*, PLAINTIFFS’ STEERING COMMITTEE FOR STRYKER REJUVENATE & ABG II MODULAR HIP STEM LITIG.,

The attorneys appeared comfortable with the cases selected for mediation.<sup>48</sup> Unlike other mass torts, where parties sometimes contest whether a plaintiff suffered an injury or was even exposed to the defendant's product,<sup>49</sup> the parties in this case could easily document plaintiffs' injuries based on objective criteria, such as barcodes for each hip, blood tests, and MRIs demonstrating adverse tissue reactions and fractured or dislocated bones.<sup>50</sup>

The steering committees took steps to avoid the risk of gamesmanship. The plaintiffs' negotiation subcommittee educated lawyers from different firms about the science and other comparable settlements for hip replacements.<sup>51</sup> Judge Martinotti also selected cases for mediation at random, with counsels' names redacted.<sup>52</sup> These techniques reduced the risks of what some scholars have called a "reverse auction"—the idea that defense attorneys will select cases whose lawyers possess less experience in the hopes of setting a "lower price" for particular injuries.<sup>53</sup>

Early in the mediation, Judge Welsh also attempted to ensure that each case entering mediation was treated on its own merits. Individual plaintiffs actively participated in each mediation process, making personal statements and describing their experiences.<sup>54</sup> The lawyers promised that the mediations would not be "test runs." That is, plaintiffs worked hard to ensure that the individual settlements would be confidential and not contingent on settlements reached in any other cases.<sup>55</sup> If the plaintiff accepted the final settlement offer, the settlement was binding and payment was made shortly thereafter.

A variety of law firms represented plaintiffs in the individual mediations.<sup>56</sup> The plaintiffs on the steering committee likely had an incentive to include other lawyers in the serial mediations to ensure they had some "skin in the game" and influence over their own client's outcomes.<sup>57</sup>

The low cost of mediations, compared to trial, meant that the parties could conduct many of them. The trial of complex medical device cases can exceed \$300,000<sup>58</sup> due to difficult questions of general and specific causation—not to mention expensive, hard-to-find expertise such as bioengineering,

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<http://rejuvenatehipsettlement.com/experimental-bellwether-mediation-program/> (last visited Mar. 25, 2017) (describing the mediation process) [<https://perma.cc/DV6E-MMSU>].

48. See Transcript of Global Settlement Program Hearing, *supra* note 2; see also Telephone Interview with Ellen Relkin, *supra* note 34.

49. See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1267 (E.D.N.Y. 1985) (finding insufficient evidence of exposure and specific causation); see also *Parker v. Mobil Oil, Corp.* 857 N.E.2d 1114 (N.Y. 2006).

50. Telephone Interview with Ellen Relkin, *supra* note 34.

51. See *id.*

52. See Civil Action Case Management Order #6, *supra* note 47.

53. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370–73 (1995); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 6 (1991).

54. See Transcript of Global Settlement Program Hearing, *supra* note 2.

55. Telephone Interview with Diane M. Welsh, Mediator, JAMS (Mar. 11, 2017).

56. Telephone Interview with Ellen Relkin, *supra* note 34.

57. Telephone Interview with Diane M. Welsh, *supra* note 44.

58. Telephone Interview with Ellen Relkin, *supra* note 34.

orthopedic, regulatory, toxicological, or other medical experts.<sup>59</sup> By comparison, the parties conducted as many as two mediations a day for less than \$5,000 each.<sup>60</sup> As a result, lawyers on both sides captured information about a wide range of injuries and settlement values.

The participants also produced important information from individual mediations.<sup>61</sup> Judge Welsh found that parties did not hold back in each session, providing sophisticated evidence, presentations, and arguments ordinarily associated with litigation. Parties produced “mediation statements” in advance of the proceeding, as well as detailed presentations about the nature and scope of damages. In mass litigation of this size, where few cases go to trial, parties had good reason to treat individual mediations as though they were “the whole ballgame.”<sup>62</sup>

Although the parties originally agreed to ten mediations, over time, more attorneys sought to participate in the bellwether mediation process.<sup>63</sup> In about one year, twenty out of twenty-one cases were resolved through the New Jersey mediation process.<sup>64</sup> Combined with mediations in the federal MDL process, the parties reached approximately forty settlements in mediation.<sup>65</sup> Each side found that the number of mediations gave the parties “a really good handle on the basis for compensating particular injuries . . . to understand the big picture.”<sup>66</sup>

## 2. Phase II: Global Settlement Talks

After the individual mediations concluded, Judge Martinotti and the parties developed a process to discuss global settlement.<sup>67</sup> Each negotiating member collected and shared anonymous data about all the claimants who completed mediation. Among other things, the parties included the ages, defects, disabilities, surgeries, settlement amounts, and other remedies associated with each case.

Organizing the discussions took some coordination between judges and parties—particularly because they involved different attorneys working across jurisdictions in federal and state court.<sup>68</sup> In the course of the global

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59. *Id.*

60. *Id.*

61. See Transcript of Global Settlement Program Hearing, *supra* note 2.

62. Telephone Interview with Diane M. Welsh, *supra* note 44.

63. Judge Martinotti also scheduled a third phase of individual mediations to be blindly selected by the court.

64. See Civil Action Case Management Order #18, *In re Stryker Rejuvenate & ABG II Modular Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Aug. 4, 2014). The final case was resolved through postmediated settlement. *See id.*

65. Telephone Interview with Diane M. Welsh, *supra* note 55.

66. Telephone Interview with Ellen Relkin, *supra* note 34.

67. At first, Judge Martinotti appointed a confidential committee of four plaintiffs' lawyers from the New Jersey Plaintiff Steering Committee to pursue confidential settlement talks with Stryker. *See Experimental Bellwether Mediation Program*, *supra* note 47. Four designated leaders of the MDL Leadership Committee were appointed by Judge Frank to join with the New Jersey attorneys to complete the negotiations. *See id.*

68. The plaintiffs' attorneys on the federal and state steering committees also had different economic incentives in prosecuting the case. Federal multidistrict litigation often permits

talks, the parties agreed to a \$300,000 minimum base award for all plaintiffs who met basic eligibility criteria.<sup>69</sup> While it is difficult to assess how well the mediations helped the parties formulate that base award, other hip implant cases, involving similar lawyers, settled with comparable base awards.<sup>70</sup>

The mediators and parties, however, agreed that their experiences with individual mediations helped them identify a range of factors—that would have otherwise gone unnoticed—for adjusting the base award.<sup>71</sup> Among other things, the parties agreed to enhance awards for additional surgeries, infections, or more complex surgeries that required doctors to cut damaged bone to replace the hip. During the global talks, lawyers directly relied upon the experiences individual plaintiffs shared in mediation.<sup>72</sup> According to the lead plaintiffs’ counsel: “We got a read on how both sides were valuing the cases early on, began to identify some of the common situations that plaintiffs experienced and an in-depth understanding of the various types of injuries and procedures the various plaintiffs had gone through.”<sup>73</sup>

Accordingly, the bellwether mediations allowed the parties to “see beyond the case file” and agree to a “well-tuned global settlement” that captured a broad array of patients’ experiences.<sup>74</sup>

Global settlement negotiations may have moved swiftly for another important reason: the parties agreed to an “uncapped settlement,” much like recent settlements involving the BP oil spill and the NFL concussion litigation.<sup>75</sup> In an uncapped settlement, the defendant does not agree to a total settlement award. Instead, the defendant agrees to an objective process for resolving certain claims and, often, a separate facility to resolve them. Of course, even in uncapped settlements, the parties have reason to vigorously contest every aspect of the settlement process.<sup>76</sup> But the possibility of an

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members of the steering committee to receive a common benefit fee—a tax of sorts on all the individual cases that benefit from their work on behalf of all the litigants. *See, e.g., In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2011 WL 6817982 (E.D. La. Dec. 28, 2011); William B. Rubenstein, On What a “Common Benefit Fee” Is, Is Not, and Should Be, 3 CLASS ACTION ATT’Y FEE DIG. 87, 88–90 (2009).* New Jersey multicounty litigation does not provide for such awards. Accordingly, the attorneys with the most individual cases, and the most to gain, had different incentives to actively negotiate in the global settlement discussions.

69. *See* Master Settlement Agreement § 7.1, *In re Stryker Rejuvenate & ABG II Modular Hip Implant Litig.*, No. BER-L-936-13, MCL 296 (N.J. Super. Ct. Law Div. Nov. 3, 2014); Transcript of Global Settlement Program Hearing, *supra* note 2.

70. *See* Barry Meier, *J. & J. in Deal to Settle Hip Implant Lawsuits*, N.Y. TIMES, Nov. 20, 2013, at B2 (noting that the typical payout equaled \$250,000 before accounting for legal fees and medical liens).

71. Telephone Interview with Ellen Relkin, *supra* note 34; Telephone Interview with Diane M. Welsh, *supra* note 44.

72. *See* Transcript of Global Settlement Program Hearing, *supra* 2, at 17–19.

73. *Id.* at 18.

74. Telephone Interview with Ellen Relkin, *supra* note 34.

75. *See In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 433 (3d Cir. 2016); *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, 910 F. Supp. 2d 891, 918 (E.D. La. 2012) (emphasizing “uncapped compensation” available under the global settlement).

76. For example, BP sought to overturn its own multibillion dollar settlement complaining that the elaborate claim process it agreed to overpaid certain damage claims. *See* Mica

uncapped settlement may have reduced tensions among attorneys who represented clients with different injuries.<sup>77</sup>

After reaching a global settlement, the parties retained a claim administrator who determined compensation based on numerous factors.<sup>78</sup> Eligible plaintiffs had to file a form that demonstrated they had specific tissue damage due to the device, underwent surgery or a qualified revision surgery, or needed revision surgery (but could not undergo surgery for medical reasons). Awards were doubled for surgeries involving second hips.<sup>79</sup> In the end, 95 percent of the claimants participated.<sup>80</sup> Those with unusual injuries opted out but continue to mediate their claims today with the same mediators and attorneys.<sup>81</sup>

### 3. Factors Contributing to Their Success

In the hearing to announce the final settlement, the parties, mediators, and judges praised the bellwether settlement process for producing more relevant information about settlement values, involving more plaintiffs in the settlement process, and establishing more trust between the lawyers than in high-stakes bellwether trials.<sup>82</sup> But in subsequent conversations, they also observed that a number of characteristics in the litigation helped ensure the success of the bellwether settlement process. As described in more detail below, bellwether settlements can be an effective tool when (1) parties are open to settlement, (2) judges and parties can transparently share settlement information in state and federal court, and (3) diverse groups of law firms and plaintiffs actively participate in the mediation process.

First, the parties were open to the possibility of settlement. At least two factors contributed to the parties' willingness to consider the bellwether settlement process. First, for purposes of the mediation, the parties did not contest common questions of liability or scientific causation. The parties may have been more open to settlement talks following trials and settlements in other hip implant cases, like those involving Johnson & Johnson.<sup>83</sup> In any event, the parties and mediators observed that mediation may not be as

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Rosenberg, *Analysis: BP's U.S. Gulf Oil Spill Settlement Challenges May Backfire*, REUTERS (Jan. 15, 2014), <http://www.reuters.com/article/us-bp-settlement-analysis-idUSBREA0E16820140115> [perma.cc/FS3N-KHL3].

77. See Emily Field, *Stryker to Pay \$1B to Settle Hip Implant MDL Claims*, LAW360 (Nov. 3, 2014), <http://www.law360.com/articles/593053> [https://perma.cc/87DE-U29Y] ("What's unique is also an ability to get further payment for future complications. It's a unique feature of a mass tort settlement.").

78. See Transcript of Global Settlement Program Hearing, *supra* note 2.

79. See Master Settlement Agreement, *supra* note 69, § 7.1.3.

80. See O'Sullivan, *supra* note 12.

81. Telephone Interview with Diane M. Welsh, *supra* note 44.

82. See Transcript of Global Settlement Program Hearing, *supra* note 2, at 17–19.

83. See Meier, *supra* note 70. At least two jury trials involving Johnson & Johnson's defective implants went to trial in 2013. See *id.* Johnson & Johnson's device, which "ranks as one of the most-flawed medical implants sold in recent decades," produced two verdicts—an \$8 million dollar verdict in Los Angeles and a verdict in Chicago that rejected plaintiff's claims that Johnson & Johnson had inappropriately marketed its implant. *Id.*

effective as a trial at resolving vigorously contested, general questions of liability.<sup>84</sup>

To be sure, some forms of alternative dispute resolution can help parties resolve such issues, as well. Repeat summary jury trials, jury focus groups, and evaluative mediation have long been recommended to help attorneys understand the strengths and weaknesses of common questions of liability.<sup>85</sup> At a minimum, courts considering bellwether mediations should also consider developing a separate plan to use such techniques or to conduct bellwether trials, as Judge Martinotti did in this case.

The parties may have also been open to settlement talks because the number of potential plaintiffs, and their injuries, was relatively easy to estimate. Stryker sold the device for a discrete period of time, with traceable bar codes, and to a population where the injury could be established through objective criteria like blood tests, MRIs, and medical evaluations. These features of the Stryker litigation took difficult questions off the table. Among other things, the parties could better estimate how one mediated settlement would play out over a well-defined universe of similar cases. Courts have long said that statistical sampling best fits “inelastic” populations, when the parties can accurately define the total universe of claims.<sup>86</sup> The same may be said for bellwether mediations used to lower stakes for individual mediations and to lay a firm groundwork for global settlement talks.<sup>87</sup>

A second factor contributing to the success of the bellwether mediations was transparency. Judges and parties were able to share basic settlement information and coordinate across federal and state lines. This is no small feat. In many cases, federal multidistrict litigation will not resolve parallel state claims. When two coordinated proceedings take place in different states, with different trial plans and different lawyers, the parties may be more hesitant to share critical information. Here, Judge Martinotti and Judge Frank overcame those obstacles and scheduled joint status and settlement conferences. Over time, parties in both litigations shared information about mediated settlements that often remain private.

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84. Telephone Interview with Ellen Relkin, *supra* note 34; Telephone Interview with Diane M. Welsh, *supra* note 44.

85. See, e.g., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.313 (FED. JUDICIAL CTR. 2004) (“[J]udges should consider conducting joint comprehensive settlement negotiations, hearings, and alternative dispute resolution procedures to establish case values.”).

86. See, e.g., *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1018 (5th Cir. 1997) (observing that difficult-to-estimate or “elastic” populations are less amenable to statistical sampling).

87. For the same reason, the parties likely were more comfortable agreeing to an uncapped settlement—which, in turn, reduced strategic trade-offs in the individual and global settlement talks. Courts have approved such settlements, most recently in the NFL concussion and the BP oil spill litigation, because they do not present the same conflicts between plaintiffs’ attorneys. See, e.g., *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 433 (3d Cir. 2016) (“The Fund is uncapped and inflation-adjusted, protecting the interests of those who worry about developing injuries in the future.”). When parties agree to a total cap on a defendant’s payout for a large group of people, courts fear that plaintiffs’ attorneys negotiating the settlement may find themselves accepting funds for some clients at the expense of others. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620–21 (1997). But see *Petition for a Writ of Certiorari, Armstrong v. NFL*, 137 S. Ct. 607 (2016) (No. 16-413).

Finally, diverse groups of law firms and plaintiffs participated in the individual mediations that provided the building blocks for the global settlement process. One of the main advantages of the bellwether settlement process is that the low cost allows parties to conduct so many individual mediations. But those additional mediations provide little comparative value when they fail to involve enough law firms to feel confident in the outcome. Here, the steering committee was willing to trust a diverse group of lawyers and plaintiffs to participate in the bellwether mediation process.

## II. BEYOND THE BELLWETHER SETTLEMENT

Experiments with bellwether settlements raise broader theoretical issues. First, the parties' embrace of bellwether settlements reflects larger concerns about bellwether trials. Second, bellwether settlements suggest some value to carefully supervised "repeat play" in the resolution of large numbers of common cases. Third, these two observations suggest that, even though bellwether settlements challenge the traditional judicial role, courts can still protect the integrity of judicial proceedings increasingly dominated by settlement.

### A. Whither Bellwether Trials?

The parties' turn to bellwether mediation in *Stryker* reflects a deeper unease with bellwether trials. Judges originally adopted bellwether trials to produce critical data for parties interested in brokering global settlements, while still guaranteeing individual parties a right to their own representation and trial.<sup>88</sup> But more recently, judges and lawyers have complained that, in practice, bellwether trials limit or distort critical information needed to globally resolve cases.<sup>89</sup> Because of the substantial cost and risk associated with big cases, parties rarely conduct more than a handful of trials, often with mixed results. Moreover, bellwether trials often lead to practically binding global settlements without meaningful participation from plaintiffs.<sup>90</sup> Rather than settle in the shadow of law, the turn to bellwether settlements echoes calls by court observers to develop more transparent procedures for the large number of cases that, more often, settle in the shadow of settlement.<sup>91</sup>

#### 1. The Promise and Perils of Bellwether Trials

The same forces that once pushed lawyers and judges to embrace bellwether trials—the push for more information, participation, and accuracy when resolving many common cases—are now pushing lawyers to look for

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88. See Fallon et al., *supra* note 3, at 2332 (describing the "modern informational approach" to bellwether trials).

89. See Hellerstein, *supra* note 16, at 161–62 ("[A]t most, [bellwether trials would] have brought about settlements in individual claims or small clusters of claims. [But] [t]he parties would not have had sufficient information to effect a wholesale global settlement.").

90. See Burch, *supra* note 7; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 279–92 (2011).

91. See, e.g., J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713 (2012).

other solutions, like bellwether mediation. In the 1990s, some courts turned to “trials by statistics” to avoid time-consuming and redundant litigation.<sup>92</sup> The idea was that a court could try a sample of representative cases and then extrapolate the results to a broader group of claims.<sup>93</sup> In so doing, they hoped to avoid the duplicative expenditure of time and money associated with traditional case-by-case adjudication,<sup>94</sup> which itself threatened access to courts.<sup>95</sup>

However, statistical trials raised new concerns. First, courts resisted proceedings that traded individualized evidence of harm for “new-fangled proof of aggregated and averaged injur[ies].”<sup>96</sup> Second, courts worried about denying defendants and many absent plaintiffs their own “day in court.”<sup>97</sup> Third, courts and commentators fretted over the risk and consequences of error.<sup>98</sup> How should parties identify the most representative plaintiffs? What is the right sample size? What process would ensure plaintiffs’ lawyers conducting the trials had the right incentives and experience to represent a large group of people?

These concerns gave rise to the bellwether trial. A court would still try a small number of cases that approximated the larger universe of cases. But the results would not bind anyone. The hope was that trials would generate enough information about the remaining claims—their strengths, weaknesses, and value—to help individually represented parties forge a larger settlement.<sup>99</sup> The bellwether trial helped accommodate many of the

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92. See *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019 (5th Cir. 1997) (approving the concept of sampling, but finding that the chosen plan was defective due to the failure to use a random sample); *In re Estate of E. Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462 (D. Haw. 1995), *aff’d sub nom. Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). But see *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 653 (E.D. Tex. 1990), *rev’d in part*, 151 F.3d 297 (5th Cir. 1998).

93. See Jay Tidmarsh, *Resurrecting Trials by Statistics*, 99 MINN. L. REV. 1459, 1464 (2015); see also Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 841–51 (1992).

94. See *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 859 (6th Cir. 2013); 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 1:9, at 27 (5th ed. 2011) (“Class actions are particularly efficient when . . . the courts are flooded with repetitive claims involving common issues.”).

95. See *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986) (granting certification of a class action involving asbestos).

96. Tidmarsh, *supra* note 93, at 1464; see also *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (observing the “deep-rooted historic tradition that everyone should have his own day in court” (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996))).

97. Fallon et al., *supra* note 3, at 2331–32 (criticizing binding bellwether trials).

98. See Tidmarsh, *supra* note 93, at 1471 (noting that difficulties include “defining homogenous groups or subgroups to sample, selecting a proper sample size, ensuring adequate investment incentives for the plaintiffs who participate in the exemplary trials, and choosing unbiased factfinders”).

99. See Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571, 610–12 (2012) (describing cases in which bellwether plaintiffs were used to forge an aggregate settlement); Sherman, *supra* note 14, at 697 (stating bellwether trials “offer an accurate picture of how different juries would view different cases across the spectrum of weak and strong cases that are aggregated”).



concerns raised by statistical sampling, while promising meaningful and quick relief.

Today, bellwether trials are everywhere. In 2004, the Manual for Complex Litigation, which provides the influential guidance for federal courts confronting big cases, endorsed bellwether trials as a meaningful substitute in place of trial by statistics.<sup>100</sup> Outside of federal courts, administrative and Article I courts have also adopted bellwether trials to resolve mass tort cases, such as vaccine-related injuries.<sup>101</sup>

Nevertheless, bellwether trials have not completely lived up to their promise. First, many bellwethers never sound a bell. The cases that parties select as bellwethers often end up settling on the eve of trial. Consider the September 11 first responder litigation. After the federal district court charged with overseeing the litigation instructed the parties to organize a series of bellwether trials for workers suffering respiratory injuries, all of the cases settled.<sup>102</sup>

Second, bellwethers may actually distort, rather than clarify, a defendant's liability. Statistical sampling, when properly applied, should smooth out differences between cases over time.<sup>103</sup> By contrast, parties rarely have an incentive to complete all bellwether trials, which are expensive and risky to try. Therefore, when cases go to trial, they often produce a small number of wildly disparate outcomes.<sup>104</sup> In some cases, outlying verdicts entrench parties even further, causing negotiations to break down and prolonging a final resolution.<sup>105</sup> In the current General Motors litigation, for example, disparate verdicts have yielded little to no information for the general run of

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100. The third edition of the Manual, produced in 1995, supported trials-by-statistics plan. See MANUAL FOR COMPLEX LITIGATION (THIRD) § 33.28 (FED. JUDICIAL CTR. 1995). By the next edition in 2004, the Manual had retreated. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.5 (FED. JUDICIAL CTR. 2004) (noting only that a trial-by-statistics plan was “not accepted as mainstream”).

101. See Snyder *ex rel. Snyder v. Sec’y of Dep’t of Health & Human Servs.*, No. 01-162V, 2009 WL 332044, at \*3 (Fed. Cl. Feb. 12, 2009) (“[B]y the agreement of the parties, the evidence adduced in the . . . proceeding is applied to other cases, along with any additional evidence adduced in those particular cases. The parties are . . . not bound by the results in the test case, only agreeing that the *expert opinions and evidence forming the basis for those opinions* could be considered in additional cases presenting the same theory of causation.”); Michael Sant’Ambrogio & Adam Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2827187](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2827187) [<https://perma.cc/NMJ6-PV4B>].

102. See Benjamin Weiser, *Judge in 9/11 Suits Feels No Regret That None Ever Went to Trial*, N.Y. TIMES, Sept. 9, 2016, at A15.

103. See Edward K. Cheng, *When 10 Trials Are Better Than 1000: An Evidentiary Perspective on Trial Sampling*, 160 U. PA. L. REV. 955, 957 (2012); Saks & Blanck, *supra* note 93, at 835 (“By awarding that same amount to each of the remaining . . . plaintiffs, the court also does better, in terms of accuracy of award, than it would if it conducted . . . individualized trials.”).

104. See Hellerstein, *supra* note 16, 161–63.

105. See Martinotti, *supra* note 16, at 575 (“[I]f the parties and counsel are in the midst of successful settlement discussions, a bellwether trial that results in a verdict outside the range of settlement—i.e., an outlier—may empower a party to go forth with the litigation and cause negotiations to break down.”).

claims, while at the same time aggravating relationships between lead counsel on each side.<sup>106</sup>

Third, bellwether trials do not encourage plaintiffs to meaningfully participate in trial or a final settlement. In some cases, the global settlement may not fully reflect the interests and desires of individual clients. When parties in the national Vioxx litigation reached a global settlement following several bellwether trials, some believed the final settlement simply reflected the extraordinary pressure that plaintiffs' attorneys exerted over their clients to take the final settlement.<sup>107</sup>

This is not to say that bellwether trials lack value. Such trials are useful, even if they do not always live up to their promise. Bellwether trials evolved to provide more fitting information, with greater accuracy and more meaningful participation than high-stakes trials by statistics. Bellwether trials also continue to serve a valuable purpose by creating a deliberative, democratic process to determine parties' rights and responsibilities—not to mention practical leverage to get parties to the bargaining table. But like statistical trials, they also struggle to increase representative outcomes, promote input, and curb strategic behavior between and among counsel.

In many cases, the process by which parties approach bellwether trials plays a more important role in the final outcome. As courts help oversee the creation of steering committees, appoint special masters and magistrate judges to broker disputes, and introduce *Lone Pine* orders and “core discovery databases,” parties have learned how to craft a private bureaucracy to globally resolve their dispute.<sup>108</sup> One could say that it is the bureaucratic structure judges create—the way courts remake individual “cases” into an organized “litigation”<sup>109</sup>—that really determines litigation outcomes. Across civil, administrative, and criminal law, such institutional arrangements often define the “going rates” used to resolve large groups of similar cases.<sup>110</sup>

The *Stryker* litigation attempted to adjust to this unstated, but well-accepted feature of bellwether trials: they rarely provide much of a

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106. See Cara Salvatore, *Trial-Light GM Bellwethers Bear Fruit for Ignition MDL Deal*, LAW360 (Sept. 6, 2016), <https://www.law360.com/newyork/articles/836591/trial-light-gm-bellwethers-bear-fruit-for-ignition-mdl-deal> [<https://perma.cc/8P8X-JX8V>].

107. See Erichson & Zipursky, *supra* note 90, at 279–92.

108. In the September 11 litigation, for example, Judge Hellerstein appointed special masters to code detailed information about 11,000 claims in a searchable computer database. Information gleaned from the database allowed the parties to select “test cases” to understand how one case resolution would impact other similar cases. “By adding or subtracting from the criteria reflected in the various fields,” according to the court, one could then identify the factors “strongly correlated with the severity of injury and which factors had a lesser impact, or no impact at all.” Alvin K. Hellerstein et al., *The 9/11 Litigation Database: A Recipe for Judicial Management*, 90 WASH. U. L. REV. 653, 658 (2013).

109. See Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5 (1991).

110. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2482 n.78 (2004) (arguing that arm’s-length plea bargaining is “tempered by stable going rates for ordinary crimes.”); Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 GEO. J.L. ETHICS 1485, 1535 (2009) (describing “going rates” for mine-run personal injury claims where settlement values are assessed in ways divorced from the underlying claims’ substantive merit).

bellwether or a trial. Rather, in *Stryker*, the value the court provided was the creation of an institutional structure for settlement.

## 2. From Bellwether Trials to Bellwether Settlements

A court's complete embrace of a bellwether settlement scheme raises interesting questions for juries: What do bellwethers settlements mean when the procedures and outcomes lack any connection to the decisions a jury might reach?

Most proponents of bellwether trials often assume some role for a jury in resolving a complex dispute. First, bellwether trials provide a "dress rehearsal" for other jury trials likely to come in a large case by helping parties hone their evidence and their arguments. Second, a bellwether jury verdict assures that any eventual settlement bears some relationship to the merits of the dispute. Third, the prospect of a jury trial in complex litigation wards off the threat of collusion and assures that the plaintiffs' counsel have sufficient bargaining strength in settlement negotiations. Fourth, a bellwether jury serves an important democratic function with deep roots in the history of American adjudication.

By dispensing with the jury entirely, bellwether settlements risk these important benefits—but such settlements do offer some advantages. First, bellwether trials do not necessarily help counsel learn how random beneficiaries of a global settlement will value their claims. The bellwether mediations, however, give the parties concrete information about how different plaintiffs, with different injuries, will likely respond to a grand bargain struck between a manufacturer and the plaintiffs. In *Stryker*, the mediation process forced lawyers, who sometimes only see the big picture in settlement, to "understand who their clients were in the mediation."<sup>111</sup> As a result, the final settlement accommodated different plaintiffs by incorporating "enhancements" grounded in the actual experiences of plaintiffs with double hip replacements, infections, open wounds, and other complications.<sup>112</sup>

Second, bellwether settlements also avoid the problem of outlier or clustering verdicts. The comparative expense of bellwether mediations means the parties could conduct a lot more of them. Moreover, the parties could ground their global settlement talks on the more targeted, narrow band of going rates for settlement exchanged between many of the lawyers. When the endgame is a global settlement, a focused sampling of arm's-length negotiations may help counsel better identify solutions from the ground up.

Finally, as discussed in more detail below, the bellwether settlement process relied on iteration and mediation to build trust necessary to share important information and include diverse groups of law firms in the process.

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111. Telephone Interview with Ellen Relkin, *supra* note 34.

112. See *supra* notes 69, 71–72 and accompanying text.

### B. The Benefits of Supervised Repeat Play

A bellwether settlement process also highlights the value of carefully supervised repeat play in the resolution of large numbers of common cases. Negotiation theory has long suggested that parties tend to share more information and improve welfare when mediated settlements take place incrementally and repeatedly.<sup>113</sup> The success of a bellwether settlement process embraces this idea.

In conflict research, commentators have long distinguished between negotiators who cooperate to “create value” and those who compete to “claim value.”<sup>114</sup> Negotiators who create value work primarily to expand the pie, producing “win-win” solutions where both parties benefit.<sup>115</sup> To do so, they identify common interests and communicate information clearly. Negotiators who claim value, by contrast, compete to claim the largest share of the goods in dispute. To be successful, they must bargain tough and horse-trade. They may start negotiating high, concede slowly, exaggerate the value of any concessions, and conceal information while arguing “forcefully on behalf of principles that imply favorable settlements.”<sup>116</sup>

David Lax and James Sebenius famously posited that claiming and creating value are not inconsistent strategies.<sup>117</sup> They are inextricably linked. At some point in any negotiation, most negotiators alternatively try to “expand the pie” or “claim their share.” But that practice presents all negotiators with a kind of prisoner’s dilemma. If both parties cooperate, they will both have good outcomes; but if one cooperates while the other competes, the cooperative party will get rolled over by the more competitive party. Even though both parties are better off if they both cooperate, in the face of uncertainty, each side’s best choice is to compete *as early in the negotiation as possible*.

These problems aggravate the agency problems that already exist in litigation. How do clients know that lawyers’ decisions to share information collaboratively, or to adopt a principled position, reflect what they want? Professional rules typically entrust these strategic negotiation decisions to lawyers,<sup>118</sup> but these problems are compounded in settlements that involve

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113. See generally D. Lax & J. Sebenius, *The Manager as Negotiator: The Negotiator’s Dilemma: Creating and Claiming Value*, in DISPUTE RESOLUTION 51 (Stephen B. Goldberg et al. eds., 3d ed. 1999).

114. See generally *id.*; ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 11–43 (2000); RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (2d ed. 1991).

115. See, e.g., ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed. 1991); MNOOKIN ET AL., *supra* note 114, at ix; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 768–71 (1984).

116. Lax & Sebenius, *supra* note 113, at 53.

117. See *id.*

118. See James J. Alfani, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 256 (1999) (observing that the profession has “not created the necessary ethics infrastructure to support this settlement culture”); Russell Engler, *Out of Sight and out of Line: The Need for Regulation of Lawyers’*

large groups of people, who not only have different claims but different interests in the settlement process and outcome.<sup>119</sup> Elderly clients in *Stryker*, for example, did not have as much time to live as younger clients. Were lawyers to push for a trial on behalf of those clients, or adopt other hard lines in negotiation, they also may risk denying them justice entirely during their lifetime. Younger clients, by contrast, may have a different interest in the timing and value of a final resolution.

Conflict theorists believe the solution to these problems involve either mediation or iteration.<sup>120</sup> First, mediation can help the parties adopt more collaborative negotiation strategies by relying on a mediator to police the ways the parties share information. Sometimes, as was the case in *Stryker*, mediators will conduct shuttle diplomacy, separating the parties, forcing them to identify mutual interests, and managing the flow of information.

Second, breaking down the negotiation into small repeat bargains can foster trust and limit gamesmanship. Models of the prisoner's dilemma have found that parties are less willing to adopt competitive positions when they know they will see each other again.<sup>121</sup> This is because repeat interactions permit parties to punish or create new opportunities for cooperation in the next. Iteration performs a similar function in negotiations. Likewise, negotiators "cooperate when they know that their current actions can affect future payoffs, when they believe that a defection now will lead to sufficient defection by their opponent to make the initial move undesirable."<sup>122</sup> Accordingly, commentators recommend breaking negotiations down into stages and forcing parties to deal with each other again and again over time. "[W]hen the negotiation is in fact one of many similar repeated encounters, the negotiators may be able to mitigate" competitive behavior.<sup>123</sup>

Bellwether mediations rely on both techniques. The parties and mediators both emphasized their willingness to share information, in part, because of the trust they established over the course of the several smaller scale mediations, with lower stakes than a bellwether trial. The process also built trust among different plaintiffs' law firms, who in a one-shot deal, might have had little input or control over the process. As the lead counsel for the plaintiffs observed:

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*Negotiations with Unrepresented Poor Persons*, 85 CALIF. L. REV. 79, 79 (1997) ("[T]he ethical rules governing lawyers, as well as most ethics textbooks, fail to address such negotiations in any specific way."); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?* 18 GEO. J.L. ETHICS 179, 182 (2004) ("Settlement negotiations are, in many respects, the ethical no-man's land of legal practice.").

119. See Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1188 (1995) (explaining that existing ethics rules do not contemplate the type of attorney-client relationships that exist in the settlement of mass torts).

120. See Sander & Rozdeiczer, *supra* note 25, at 28 n.b ("One solution to this dilemma is for the parties to make partial reciprocal disclosures over time. Another solution would be to involve a third party neutral to facilitate the exchange of information.").

121. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

122. Lax & Sebenius, *supra* note 113, at 58.

123. *Id.* at 60.

Probably even more important, we were able to gain a level of trust and comfort with the defendant that you ordinarily did not get when you are sitting down at the table to negotiate a global settlement that is as large and complex as this one.

This is not to say that this process was easy, we fought over every term, literally, over the course of the negotiations to reach today's result. There were times when we didn't think it was going to happen, but it did. We're here.<sup>124</sup>

Repeat play also has problems. Unlike people who rarely go to court, repeat lawyers and litigators can "play for the rules," working to establish positive legal precedent or settlement outcomes for future cases.<sup>125</sup> These problems are aggravated by limited court oversight over settlements.<sup>126</sup> If anything, one might say large complex litigation is plagued by too many cozy relationships between plaintiffs and defense counsel. Elizabeth Burch has, for example, found that the same law firms often repeatedly appear as lead counsel in multidistrict litigation, creating new conflicts of interests between those attorneys and their clients.<sup>127</sup> In an effort to gain trust with opposing counsel they likely will see again, attorneys, Burch fears, will go too easy on each other, accede to coercive settlement terms, or accept poorly divided settlement proceeds in exchange for high fee awards.<sup>128</sup> She accordingly recommends solutions designed to promote greater diversity, transparency, and oversight in multidistrict litigation assignments.<sup>129</sup>

Bellwether settlements cannot respond to all of these problems. They cannot correct for repeat play across different litigations nor can they assure that defendants will not select cases to mediate based on the skill of the law firm involved. When carefully supervised and regulated, however, courts can reduce these concerns, while exploiting some of the benefits of repeat play. For example, a court's blind assignment of plaintiffs and law firms to appear in mediation may improve arm's-length bargaining and reduce groupthink. Moreover, a mediation process that includes many different law firms, whose negotiated settlements will inform a global settlement, may allow parties to benefit from a diversity of viewpoints, while building necessary trust to identify common interests. Finally, when representative plaintiffs themselves appear in individual mediation—and stand to benefit from the

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124. Transcript of Global Settlement Program Hearing, *supra* note 2, at 18.

125. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1994).

126. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078–82 (1984); Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1058 (2000); Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 208 (2000).

127. See Burch, *supra* note 7; Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2724637](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2724637) [https://perma.cc/Q96D-HYFB].

128. See generally Burch, *supra* note 7.

129. *Id.* at 135–54.

individual outcome—they may check a lawyer who is more focused on his or her next payday.

### C. Judge's Information-Forcing Role

These trends suggest that, even as bellwether settlements challenge the traditional judicial role, courts can remain critical players in ensuring the integrity of judicial proceedings increasingly dominated by settlement.

Bellwether settlements arguably form part of a larger trend taking place in the American courthouse. As public courts export more cases to private dispute resolution (like mandatory arbitration), they have imported tools from alternative dispute resolution to creatively resolve problems. Increasingly, courts use annexed arbitration, special settlement masters, and “problem solving” courts.<sup>130</sup> The result may offer solutions that promise more open and quick legal access than traditional jury trials. The challenge, however, is to determine what role our courts should play when large cases push them to move outside their traditional public role as adjudicators.

Under one line of thought, the “classical” model, judges facilitate settlement through public, case-by-case reasoning.<sup>131</sup> That is, people ordinarily resolve disputes on their own, but when they cannot, courts provide a neutral place to resolve their problems.<sup>132</sup> Courts can determine the parties’ right to a legal remedy by relying on the arguments the parties make and the evidence they introduce.<sup>133</sup> Future disputants may then use precedent set in that earlier case to solve similar problems, often by reaching individual settlements negotiated in “the shadow of the law.”<sup>134</sup>

As illustrated above, however, many cases do not settle that way. When parties schedule bellwether trials, litigants must settle large numbers of civil cases with little individualized input and according to norms that bear weak resemblance to any substantive law. Such trends are not limited to complex litigation. In personal injury and automobile insurance litigation, for example, plaintiff and defense lawyers rely on routine settlement practices in

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130. See Judith Resnick, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2807 (2015) (describing policies that “press trial-level judges to become conciliators, to deploy other individuals as ‘neutrals’ to mediate or to arbitrate in courts, and to outsource decision making to the private market”).

131. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1285 (1976) (famously noting that, historically, “courts could be seen as an adjunct to private ordering, whose primary function was the resolution of disputes about the fair implications of individual interactions”).

132. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824–25 (1985) (identifying and questioning American reliance on neutral judicial decision making).

133. See STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 38 (1984); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 383 (1978).

134. Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

individual cases—sometimes using obscure settlement formulas to resolve claims brought by similarly situated victims.<sup>135</sup> Even as the American litigation system promises everyone a “day in court,”<sup>136</sup> outcomes in civil disputes often turn on how unfamiliar organizations of lawyers and businesses lump together large groups of cases on a spreadsheet.<sup>137</sup>

These issues are a real problem for an American-style litigation system, which, for better or worse, heavily relies on courts to deter bad conduct and compensate for losses.<sup>138</sup> As Stephen Yeazell observes, lawyers often price settlements “in the dark—engaging in transactions for civil claims in a state of ignorance we think intolerable in other similarly important markets.”<sup>139</sup> For that reason, Yeazell calls for the creation of a system, modeled on other forms of market regulation, to track civil settlements.<sup>140</sup> Public databases would code “various factors that might reduce or increase the settlement value of the claim,”<sup>141</sup> including information about the plaintiff’s “medical history, age, and prior claims,” as well as “data about the accident alleged to have produced these injuries.”<sup>142</sup>

Increasingly, judges are taking on that very role in complex litigation—engaging in what commentators (including myself) have called “information forcing” or “facilitative judging.”<sup>143</sup> Early in litigation, courts devote increasing resources to help parties manage the flow of information necessary to resolve a wide variety of cases. For example, much like Judge Martinotti, Judge Eduardo Robreno successfully resolved over 180,000 asbestos claims several years ago.<sup>144</sup> He did so by helping committees of lawyers identify

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135. See Jaros & Zimmerman, *supra* note 18; Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129 (2015); see also H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 22 (2d ed. 1980) (surveying the business of insurance adjustment for automobile accidents, and describing it as “individualistic mainly in theory; in practice, it is categorical and mechanical, as any system must be if it is to handle masses of cases in an efficient manner”); Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 824–45 (2011).

136. Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008) (describing the day-in-court ideal in American law); Martin H. Redish & William J. Katt, Taylor v. Sturgell, *Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1881 (2009) (describing the “presumption that each person has a right to her day in court.”).

137. See Samuel Issacharoff & John F. Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1575–76 (2004); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1071 (2013); Remus & Zimmerman, *supra* note 135.

138. See, e.g., Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007) (observing that the “basic regulatory model” of the United States “is ex post rather than ex ante, a form of regulation that draws heavily on its common-law tradition.”).

139. Yeazell, *supra* note 20, at 143–44.

140. See *id.*

141. *Id.* at 154.

142. *Id.*

143. See Bradt & Rave, *supra* note 18; Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L.J. 329, 351 (2014); Jaros & Zimmerman, *supra* note 18.

144. See generally Eduardo C. Robreno, *The Federal Asbestos Product Liability [sic] Multidistrict Litigation (MDL-875): Black Hole or New Paradigm?*, 23 WIDENER L.J. 97 (2013).



ways to sort large numbers of claims very early in the process.<sup>145</sup> Judge Alvin Hellerstein similarly helped parties create a “core discovery database,” requiring counsel to produce and code medical histories thousands of September 11 workers; in doing so, he helped the parties systematically identify over two hundred different types of injuries, which aided their pursuit of a historic global settlement.<sup>146</sup>

Viewed in this light, Judge Martinotti’s bellwether mediations carve out a similar role for judges to help parties overcome problems in a relatively unregulated settlement market. Bellwether settlements, when carefully supervised by a court, can encourage parties to establish fair settlement values, exchange information about them, and, in the process, build trust necessary to forge a much larger global settlement. Such targeted interventions can be a vital part of the judicial role in promoting information, participation, and distributive justice.

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145. *See id.*

146. Hellerstein et al., *supra* note 108, at 654.